



**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. 1:10-CV-01251 RHS/RLP

STATE OF NEW MEXICO, NEW MEXICO
ENVIRONMENT DEPARTMENT, and
RON CURRY in his official capacity as
Secretary of the New Mexico Environment
Department,

Defendants.

**LOS ALAMOS NATIONAL SECURITY, LLC'S
MOTION FOR LEAVE TO INTERVENE**

Los Alamos National Security, LLC (“LANS”) hereby moves the Court pursuant to Fed. R. Civ. P. 24 for leave to intervene as a plaintiff in this action. For the reasons set forth below, LANS should be permitted to intervene as a matter of right or, in the alternative, permissively. Intervention is necessary to allow LANS to protect its direct and substantial interests in the November 30, 2010 Final Order of the Secretary of the New Mexico Environment Department (“NMED”) issued in the following captioned matter: *In the Matter of the Application of the United States Department of Energy and Los Alamos National Security, LLC for a Hazardous Waste Facility Permit for Los Alamos National Laboratory, #HWB09-37(P)* (the “Final Order”) and the accompanying final Hazardous Waste Facility Permit No. NM0890010515-1 (the “Final Permit”) that are the subject of the Complaint in this action. As grounds in support of this Motion, LANS states as follows:

1. LANS is a limited liability company organized under the laws of the state of Delaware. LANS is a co-operator of the Los Alamos National Laboratory (the “Laboratory”) pursuant to a contract with the United States Department of Energy (“DOE”) that became



effective on June 1, 2006. LANS and the DOE are co-operators and co-permittees under the Final Permit in this matter.

2. Los Alamos National Laboratory is a national research laboratory that conducts research on nuclear weapons and manages other national defense and civilian research programs, including nuclear physics, medium energy physics, space physics, hydrodynamics, conventional explosives, chemistry, metallurgy, radiochemistry, space nuclear systems, controlled thermonuclear fusion, laser technology, superconductivity, environmental technology, geothermal energy, solar energy, fossil fuel energy, carbon sequestration, nuclear safeguards, biomedicine, and health and biotechnology. The Laboratory is a facility that treats and stores hazardous waste under the Final Permit issued pursuant to the New Mexico Hazardous Waste Act, NMSA 1978, §§ 74-4-1 through 74-4-14, and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 to 6992k.

3. In its Complaint, filed December 29, 2010 (Doc. No. 1), Plaintiff seeks, among other remedies, declaratory and injunctive relief declaring that certain provisions of the Final Permit are arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the record, and otherwise not in accordance with law.

4. LANS should be allowed to intervene in this action as a matter of right pursuant to Fed. R. Civ. P. 24(a), and applicable U.S. Court of Appeals for the Tenth Circuit precedent. Consistent with Rule 24(a), the Tenth Circuit has held that a motion to intervene as a matter of right should be granted where: (1) the application is timely; (2) the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) the applicant's interest may as a practical matter be impaired or impeded; and (4) the applicant's interest is not adequately represented by existing parties. *See San Juan County, Utah v. United States*, 420

F.3d 1197, 1207 (10th Cir. 2005). These requirements are interpreted on a “somewhat liberal line” to allow intervention. *See id.* at 1207. LANS’ Motion to Intervene of right readily satisfies the Tenth Circuit’s test.

5. First, LANS’ Motion is timely. Rule 24 does not specify a particular time by which a motion to intervene must be filed. The Tenth Circuit therefore evaluates the timeliness of a motion to intervene “in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.” *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001) (quoting *Sanguine, Ltd. v. U.S. Dep’t of Interior*, 736 F.2d 1416, 1418 (10th Cir.1984)). This Motion is being filed on the same day that the Plaintiff filed its Complaint. Thus, LANS’ Motion to Intervene satisfies Rule 24’s timeliness requirement. *See Utah Ass’n of Counties*, 255 F.3d at 1251 (holding intervention timely in light of “the relatively early stage of the litigation and the lack of prejudice to plaintiffs flowing from the length of time between the initiation of the proceedings and the motion to intervene”).

6. Second, LANS has a substantial interest in the subject of the action. An applicant for intervention must claim an interest that is “direct, substantial, and legally protectable.” *San Juan County*, 420 F.3d at 1207 (quoting *Utah Ass’n of Counties*, 255 F.3d at 1251). The “interest test is ‘primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.’” *Id.* (quoting *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002)). Put simply, the goal of intervention under Rule 24(a)(2) is to allow every party with an interest in the lawsuit to participate directly, so long as their participation does not compromise the integrity of the process. The New Mexico Environment Department’s Final Order and Final Permit being

challenged by Plaintiff in this litigation directly and substantially impacts LANS' interests. LANS and the United States Department of Energy were Applicants in the permit application for a Final Permit (*In the Matter of the Application of the United States Department of Energy and Los Alamos National Security, LLC for a Hazardous Waste Facility Permit for Los Alamos National Laboratory*, #HWB09-37(P)). LANS is the co-operator and co-permittee with the United States Department of Energy under the Final Permit. LANS thus meets this element of Rule 24. *See also Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1344 (10th Cir. 1978) (holding that a proposed intervenor's interest in a uranium mine license justified intervention).

7. Third, LANS' interest may, as a practical matter, be impaired or impeded if LANS is not allowed to intervene. The demonstration of the impairment of that interest is a relatively straightforward matter. "To satisfy [the 'impairment'] element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is *possible* if intervention is denied. This burden is *minimal*." *San Juan County*, 420 F.3d at 1210 (quoting *Utah Ass'n of Counties*, 255 F.3d at 1253) (emphasis added). As stated in the Advisory Committee Notes on the 1966 amendment to Rule 24, "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene. . . ." Plaintiff's Complaint raises substantial issues regarding specific terms and conditions of the Final Permit directly impacting LANS' management and operational responsibilities. For example, the Complaint challenges conditions affecting the operation of and discharges from a radioactive liquid waste treatment facility that is critical to LANS' operation and management of Los Alamos National Laboratory. As a co-permittee under the Final Permit, LANS' conduct in managing and operating Los Alamos National Laboratory will be directly

impacted by the resolution of those issues. If LANS is not a party to the litigation, it could be subject to conflicting requirements of obligations. This element of the intervention standard is thus met.

8. Fourth, the final consideration governing intervention of right is whether “the applicant’s interest is adequately represented by existing parties.” Fed. R. Civ. P. 24(a)(2). Although “[t]he applicant bears the burden of showing that the existing parties will not adequately represent the prospective intervenors’ interest,” this burden is, once again, “‘minimal.’” *San Juan County*, 420 F.3d at 1211 (quoting *Utah Ass’n of Counties*, 255 F.3d at 1254). “[T]his showing is easily made when”—as here—“the party upon which the intervenor must rely is the government, whose obligation is to represent not only the interest of the intervenor but the public interest generally, and who may not view that interest as coextensive with the intervenor’s particular interest.” *Id.* at 1212 (quoting *Utah Ass’n of Counties*, 255 F.3d at 1254). In such a situation, the Tenth Circuit has “‘repeatedly pointed out that . . . the government’s prospective task of protecting not only the interest of the public but also the private interest of the petitioners in intervention is on its face impossible and creates the kind of conflict that satisfies the minimal burden of showing inadequacy of representation.’” *Id.* (quoting *Utahns for Better Transp.*, 295 F.3d at 1117). As a private entity with specific, private contractual obligations for the operation of Los Alamos National Laboratory, LANS’ interests diverge from the broader public interests of the United States and the DOE. LANS’ interests thus are not adequately represented by the existing parties.

9. For these reasons, LANS is entitled to intervention as a matter of right.

10. In the alternative, this Court should grant permission for LANS to intervene pursuant to Fed. R. Civ. P. 24(b) because: (1) this Motion to Intervene is timely; (2) LANS’

claims in this case will raise common issues of law or fact; (3) LANS' intervention will not unduly delay or prejudice the rights of the original party; and (4) LANS' participation will contribute to a full exposition of the facts and law applicable to this case. *United Nuclear Energy Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (noting that "permissive intervention is a matter within the sound discretion of the district court").

11. LANS adopts by reference the Plaintiff's Complaint as the pleading setting forth the claims for which intervention is sought. *See Payne v. Weirton Steel Company*, 397 F. Supp. 192, 197 (N.D. Va. 1975) (allowing the intervenors to adopt the complaint of the plaintiffs where doing so would "avoid duplication of effort as to filing amended complaints and amended answers and likely would not delay the progress of this civil action.")

12. Counsel for Plaintiff, the only party yet to have entered an appearance or file a pleading in this action, has been contacted and advised that Plaintiff supports LANS' Motion to Intervene.

WHEREFORE, Los Alamos National Security, LLC respectfully requests that the Court enter an order authorizing Los Alamos National Security, LLC to intervene as a plaintiff and granting such other and further relief as the Court may deem just and proper.

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30 day of December, 2010, I electronically filed the foregoing **LOS ALAMOS NATIONAL SECURITY, LLC'S MOTION FOR LEAVE TO INTERVENE** with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

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